VIA E-MAIL

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ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

MATHEW ENTERPRISE, INC., dba STEVENS CREEK CHRYSLER JEEP DODGE AND RAM,

Protestant,

v.

FCA US, LLC,

Respondent.

PROTEST NO: PR- 2487-16
Vehicle Code Section 3060

Protestant, Mathew Enterprise, Inc. dba Stevens Creek Chrysler Jeep Dodge and Ram, a California corporation, qualified to do business in California, through its attorneys, files this protest under provisions of California Vehicle Code Section 3060 and alleges as follows:

1. Protestant is a new motor vehicle dealer selling Chrysler, Jeep, Dodge, and Ram ("CJDR") vehicles and parts, is duly licensed as a vehicle dealer by the State of California, and is located at 4100 Stevens Creek Boulevard, San Jose, CA 95129; Protestant's telephone number is (650) 815-5110.

2. Respondent distributes FCA products and is the franchisor of Protestant.

3. Protestant is represented in this matter by Law Offices of Michael J. Flanagan, whose address and telephone number are 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California 95825; (916) 646-9100.

4. Protestant has operated as an authorized Ram new motor vehicle dealer at Protestant's Current Location since December 6, 2006.

5. Protestant and Respondent are parties to written dealership agreements ("Dealer Agreements") establishing Protestant as a franchised dealer for the sale of Ram brands of vehicles.

6. The Dealer Agreements authorize Protestant to conduct Ram dealership operations only at the Protestant's Current Location. However, Section 11(d)(ii) of the Additional Terms and Provisions of each Dealer Agreement contemplates Protestant being able to change the location of its dealership operations with FCA's prior written approval. Specifically, Section 11(d)(ii) provides, in applicable part, that "[Protestant] shall not make any changes in the location of Dealership Operations . . . without the prior written approval of [FCA]."

7. Protestant's Current Location at 4100 Stevens Creek Boulevard, San Jose, CA 95129 is owned by FCA Realty LLC (f/k/a Chrysler Group Realty Company LLC) ("FCA Realty").

8. FCA Realty is a limited liability company doing business in California and is organized under the laws of the State of Delaware, with its principal place of business located at 1000 Chrysler Drive, Auburn Hills, MI 48326.

9. FCA Realty is a wholly-owned subsidiary of FCA or of FCA's parent or of another entity that shares, either directly or indirectly, common ownership with FCA.

10. There exists, and at all times herein mentioned, has existed a complete unity of interest between FCA and FCA Realty, such that any individuality and separateness between them have ceased, and they are the alter ego of each other. FCA exercises complete control and dominance of the business of FCA Realty, and all major decisions for FCA Realty, including the purchase, sale and lease of properties for Ram dealerships, are made by FCA.

11. On or about December 6, 2006, Protestant entered into what it believed was a temporary lease agreement ("Lease") with Chrysler Realty Company LLC ("Old Chrysler Realty") until Old

Chrysler Realty prepared a land sale agreement under which MEI's owner would own the property outright.

12. Although the Lease has been a subject of dispute between the parties to it, Protestant has continued to occupy Protestant's Current Location since it commenced operations at that location.

13. Old Chrysler Realty's interest in Protestant's Current Location was acquired by FCA Realty in or about June 2009 as the result of the bankruptcy of Old Chrysler Realty and its affiliates.

14. The dealership facilities at Protestant's Current Location are antiquated and not competitive, and in dire need of renovation or replacement.

15. An upgrade in Protestant's dealership facility is essential for the continued viability and success of Protestant's business under the Dealer Agreements.

16. Since commencing operations, Protestant has attempted to purchase the land and buildings at Protestant's Current Location, initially from Old Chrysler Realty and then from FCA Realty, in order to renovate or replace the dealership facilities thereon and provide Protestant with a competitive dealership facility, which is essential to the continued viability and success of Protestant's business under the Dealer Agreements.

17. Protestant believed that it had an agreement with Old Chrysler Realty, which had been assumed by FCA and FCA Realty, under which Protestant could buy Protestant's Current Location at a price agreed to by Protestant and Old Chrysler Realty, and that FCA and FCA Realty reneged on that agreement.

18. Accordingly, on or about November 30, 2010, Protestant brought a legal action against FCA and FCA Realty in Superior Court of California, Santa Clara County, to enforce the agreement described in the immediately preceding paragraph, which action was unsuccessful and resulted in a decision in favor of the Respondents being rendered on or about November 3, 2015.

19. Prior to January 1, 2016, FCA debited Protestant's account with FCA each month in the total amount of $69,000 ($57,000 in "base rent," $10,300 in real estate taxes and $1,700 in insurance), purportedly as consideration for Protestant's occupancy of Protestant's Current Location.

20. On or about December 21, 2015, Protestant received a demand letter, dated December 18, 2015, from FCA Realty. In that letter, FCA Realty notified Protestant that, unless Protestant executed

and returned to FCA Realty a copy of a new lease ("Proposed New Lease"), which was attached to the letter, by December 31, 2015, FCA Realty would increase "the current rental rate by 200% . . ."

21. The Proposed New Lease contained, among other terms and conditions, the following:

a. The lease term would be five (5) years with no option by Protestant to renew upon the expiration of the term.

b. The initial monthly base rent would be $93,907.

c. FCA Realty would have the right, but not the obligation, to construct new dealership facilities at Protestant's Current Location at a cost not to exceed $14,000,000 ("Respondent's Facility Proposal").

d. No payment or reduction in rent would be provided to Protestant as compensation for the disruption of its business operations during the construction of the new facilities.

e. Assuming Respondent's Facility Proposal was implemented, the monthly base rent would be adjusted to the sum of $93,907, plus 10% of the total cost of the improvements divided by 12. By way of example, the Proposed New Lease stated that, if the total cost of the construction was the maximum amount of $14,000,000, the post-construction monthly base rent would be determined as follows: $93,907 + (($14,000,000) * 0.10) /12) = $210,573.67.

22. Protestant did not accept the Proposed New Lease for the following business reasons:

a. It provided no assurance that Respondent's Facility Proposal would be implemented and provide Protestant with competitive facilities for its Ram dealership at the Protestant's Current Location.

b. If Respondent's Facility Proposal were implemented, Protestant would have no control over the design or cost of the new facilities.

c. If Respondent's Facility Proposal were implemented, the likely cost would be at or near the maximum cost of $14,000,000, and would result in an annual rent factor expense for the dealership in excess of $2,750,000 (at least $2,500,000 in annual base rent and at least $250,000 in annual taxes and insurance).

d. A monthly base rent of $210,000 would significantly exceed a market-based rent for an automobile dealership business at Protestant's Current Facility even with newly constructed competitive facilities.

e. Upon information and belief, the rent factor under Respondent's Facility Proposal would far exceed the rent factors of Protestant's closest interbrand and intrabrand competitors and greatly diminish the pro-competitive effects for Protestant of having a newly-constructed competitive facility.

f. Protestant has been marginally profitable at Protestant's Current Facility even with an annual rent factor of $828,000. While construction of a competitive facility at Protestant's Current Location would increase Protestant's sales, the gross profits generated by those increased sales would not come close to covering a rent factor that would be more than three times Protestant's pre-2016 rent factor and would render Protestant so uncompetitive and unprofitable that it eventually would be forced to cease operations of its Ram dealership at Protestant's Current Location.

g. Protestant would have no control over whether it could remain at Protestant's Current Location at the end of the Proposed New Lease's five-year term and no control over the rent it would have to pay if it did remain at that location and, therefore, could not make long-term business plans due to uncertainty regarding the dealership's location, facilities and rent factor after five years.

h. As detailed below, Protestant has an alternative plan ("Protestant's Relocation Facility Proposal") for providing its Ram dealership with competitive facilities which would result in a rent factor that would be a fraction of its rent factor under Respondent's Facility Proposal and which would allow Protestant to have control over its business future by constructing a competitive facility on land owned by Protestant or an affiliate under common ownership and control with Protestant.

23. Effective January 1, 2016, FCA has begun to debit Protestant's account in the total amount of $138,000 ($126,000 for "base rent," $10,300 for real estate taxes and $1,700 insurance

escrow), purportedly as consideration for Protestant's occupancy of Protestant's Current Location, which action has caused Protestant's annual rent factor to suddenly double from $828,000 to $1,656,000.

24. The current purported monthly "base rent" under the Lease of $126,000 is far in excess of a market rent for the Protestant's Current Location given the uncompetitive dealership facilities at that location.

25. In a January 27, 2016 letter from its counsel to FCA, Protestant requested FCA's approval pursuant to Section 11(d)(ii) of the Dealer Agreements to relocate its Ram dealership from Protestant's Current Location to 3566 Stevens Creek Boulevard ("Proposed Location"), which is owned by Protestant's owner, Mathew Zaheri, and for Protestant or an affiliate to construct a new facility for the dealership at that location ("Protestant's Relocation and Facility Proposal").

26. The Proposed Location is approximately 0.6 miles from Protestant's Current Location and, like the Protestant's Current Location, is on the Stevens Creek Boulevard auto row.

27. Protestant's Relocation and Facility Proposal includes Protestant's commitment to provide a state-of-the-art dealership facility at the Proposed Location which will fully comply with all of FCA's reasonable facility requirements and which will be equal to the FCA-approved facility that Protestant has already constructed for its Ram dealership in Pleasanton, California.

28. Protestant's Relocation and Facility Proposal would result in a dealership location and facility for the conduct of Protestant's dealership operations under the Dealer Agreements that are equal to or better than the dealership location and facility under the Respondent's Facility Proposal and at an annual rent factor that is at least $2,200,000 less than the annual rent factor that would be imposed on Protestant by Respondent's Facility Proposal.

29. On February 5, 2016, FCA responded to Protestant's Relocation and Facility Proposal with a letter rejecting that proposal, in part, on the ground that Protestant had not provided "any details about the proposed relocation." In addition, FCA's letter indicated its intention to reject the proposal even after details were provided.

30. On February 23, 2016, Protestant responded to FCA's rejection of Protestant's Relocation and Facility Proposal with a detailed letter by its counsel and documentation which provided FCA with

the "details about the proposed relocation" that it contended were missing from Protestant's original request for FCA's approval of the proposal.

31. On March 29, 2016, Attorney Mark Clouatre, acting on behalf of FCA, sent Protestant's counsel a letter stating that FCA rejected the proposal and set forth various alleged reasons for the rejection.

32. The alleged reasons for FCA's rejection of Protestant's Relocation and Facility Proposal are without merit and pre-textual. FCA's real reason for rejecting Protestant's Relocation and Facility Proposal is to force Protestant to remain at Protestant's Current Location at an unaffordable rent factor and eventually be forced to terminate the Dealer Agreements and cease doing business as a Ram dealer.

33. FCA has made no secret of its desire to replace Protestant as the Ram dealer on the Stevens Creek Boulevard, auto row, which desire is motivated by Protestant asserting its perceived legal rights in the relationship on several occasions.

34. FCA's alleged reasons for rejecting Protestant's Relocation and Facility Proposal begin with its alleged "doubt that MEI will actually build the proposed facility." Ex. E. This reason is without merit and pre-textual because Mr. Zaheri has recently completed construction of a FCA-approved, state-of-the-art facility for his Ram dealership in Pleasanton, California on land that, like the Proposed Location, he also owns. Moreover, FCA could approve Protestant's Relocation and Facility Proposal only on condition upon the proposed facility being built.

35. FCA's alleged reasons also include that it "does not believe the renderings [of the proposed facility submitted with Protestant's counsel's February 23, 2016 letter] make sense with respect to the Proposed Location." This alleged reason is without merit and pre-textual because the renderings do "make sense" and, also, because Protestant will obviously modify them to the extent needed to make the facility fit at the Proposed Location in the most efficient manner.

36. FCA's alleged reasons also include the asserted contention that the Proposed Location has less frontage along and is more visible from Stevens Creek Boulevard. These reasons are without merit and pre-textual because the frontage and visibility of both properties along or from Stevens Creek Boulevard are not materially different.

37. FCA's alleged reasons also include the assertion that the majority of sales in the Stevens Creek Boulevard auto row have historically been accomplished by dealers closer to Protestant's Current Location than to the Proposed Location. This reason is without merit and pre-textual because the Proposed Location is located near the strongest competitors – Ford and Chevrolet – in the model segments in which Ram vehicles compete. In addition, the distances separating the dealership locations on the Stevens Creek Boulevard auto row, which spans just two miles, are, at worst, immaterial in that any customer visiting the auto row to buy a vehicle will likely visit the dealerships for all brands selling vehicles in the model segment in which the customer is interested.

38. The Proposed Location has heavier traffic than Protestant's Current Location because of its location at the intersection of San Tomas Expressway and Stevens Creek Boulevard and closer proximity to the Valley Fair Shopping Center and Santana Row shopping area.

39. Whether Protestant is located at Protestant's Current Location or the Proposed Location, FCA's calculation of Protestant's expected sales and planning potential will be the same, which demonstrates that, even by FCA's standards, there is no material difference between Protestant's Current Location and the Proposed Location with respect to new Ram sales potential.

40. Even if one or more of FCA's alleged reasons for rejecting Protestant's Relocation and Facility Proposal was valid, such validity would be greatly outweighed by the fact that Protestant's Relocation and Facility Proposal will result in a rent factor for Protestant that is five to six times less than the rent factor would be under Respondent's Facility Proposal. That this lower rent factor would benefit both Protestant and FCA in terms of increasing new Ram sales demonstrates that FCA's real reason for refusing to approve Protestant's Relocation and Facility Proposal is to force Protestant to cease operating as a Ram dealer.

41. Upon information and belief, if Protestant were to implement the Protestant's Relocation and Facility Proposal without Respondent's prior written approval, Respondent would terminate the Dealership Agreements.

42. Upon information and belief, if Protestant remains at Protestant's Current Location and does not accept Respondent's Facility Proposal, Respondent will also terminate the Franchise either directly or indirectly by causing FCA Realty to terminate Protestant's rights as a tenant to occupy

Protestant's Current Location, which is the only currently authorized location at which Protestant can conduct Ram operations under the Dealer Agreements.

43. Even if Protestant remains at the Protestant's Current Location without accepting Respondent's Facility Proposal and Respondent does not directly or indirectly terminate the Franchise, Protestant will ultimately be forced to give up the Dealer Agreements and go out of business without an affordable upgrade of its dealership facility.

44. On June 24, 2016, Protestant filed a complaint against Respondent in the United States District Court, Northern District of California alleging, in part, Protestant is acting in violation of Cal. Veh. Code § 3060.

45. On November 16, 2016, the District Court dismissed Protestant's claims, including its claim under the Cal. Veh. Code because Protestant had not exhausted its administrative remedies by first bring the matter to the California New Motor Vehicle Board. (Exhibit A).

46. FCA's refusal to approve Protestant's Relocation and Facility Proposal will result in the constructive termination of Protestant's existing franchise without notice or good cause in violation of California Vehicle Code § 3060 because it will result in the insolvency of the Protestant and force Protestant out of business.

47. Such constructive termination will result from FCA's economic duress of Protestant by wrongfully compelling Protestant to remain at Protestant's Current Location and to either attempt to compete with an antiquated and uncompetitive dealership facility or incur a ruinous rent factor by being forced to accept Respondent's Facility Proposal. Under either scenario, Protestant will become insolvent and forced to surrender its Ram franchise against its will.

48. FCA's refusal to approve Protestant's Relocation and Facility Proposal is an act which amounts to the constructive termination of Protestant.

49. Respondent has not provided notice for termination of Protestant's franchise as required by Cal. Veh. Code § 3060.

50. Respondent does not have good cause to terminate the franchise by reason of the following facts:

a. Protestant has made a substantial and permanent investment in the dealership.

b. Protestant has transacted and is transacting an adequate amount of FCA business compared to the business available to it.

c. Protestant has fulfilled the warranty obligations to be performed by it.

d. The extent of any failure of Protestant to comply with the terms of the franchise agreement is immaterial.

e. Protestant has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of FCA buyers and owners in the market area and is rendering adequate service to the public.

f. It would be injurious to the public welfare for the franchise to be terminated or for Respondent to refuse to continue the existing franchise.

g. Protestant's failure to fulfill Respondent's sales and/or service expectations, if any, is in whole or in part the result of Respondent's action or inaction, market analysis deficiencies, product deficiencies, product scarcities and/or market conditions, and Respondent's unreasonable method of evaluating performance.

51. Protestant and its attorneys desire to appear before the Board and/or its designated hearing officer and estimate that the hearing in this matter will take seven (7) days to complete.

WHEREFORE, Protestant prays as follows:

1. That the Board sustain this protest and order Respondent not to terminate Protestant's FCA franchise, as alleged herein, nor refuse to continue its existing franchise.

2. That pending the hearing in this matter, the Board or its executive director or authorized representative immediately order Respondent not to terminate or refuse to continue Protestant's franchise until such time as Respondent has established good cause for such actions under the provisions of Vehicle Code Sections 3060 and 3061.

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3. That a pre-hearing conference be set and the parties notified thereof.

4. That Protestant be awarded such other and further relief as the Board deems just and proper.

Dated: November 22, 2016

LAW OFFICES OF
MICHAEL J. FLANAGAN

By: [signature]
Michael J. Flanagan
Attorneys for Protestant

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Valerie A. Coffey, declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, 95825.

I declare that on November 22, 2016, I caused to be served a true and complete copy of:

PROTEST
Steven Creek Chrysler Jeep Dodge and Ram
V
FCA US LLC
Protest NO. PR-unassigned
Ram

By First Class Mail:

Mark Clouatre
NELSON MULLINS RILEY & SCARBORBORUGH
1400 16th Street
Suite 400
Denver CO 80202

Also by Electronic Mail

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 November, 2016, Sacramento, California.

Valerie A. Coffey

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Valerie A. Coffey, declare that I am employed in the County of Sacramento, State of California, that I am over 18 years of age, and that I am not a party to the proceedings identified herein. My business address is 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, 95825.

I declare that on November 22, 2016, I caused to be served a true and complete copy of:

PROTEST
Steven Creek Chrysler Jeep Dodge and Ram
V
FCA US LLC
Protest NO. PR-unassigned
Ram

By First Class Mail:

Mark Clouatre
NELSON MULLINS RILEY & SCARBORBORUGH
1400 16th Street
Suite 400
Denver CO 80202

Also by Electronic Mail

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 November, 2016, Sacramento, California.

Valerie A. Coffey

Exhibit A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MATHEW ENTERPRISE, INC.,
Plaintiff,
v.
FCA US, LLC,
Defendant.

Case No. 16-CV-03551-LHK

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Re: Dkt. No. 19

Plaintiff Mathew Enterprise, Inc. ("Plaintiff") sues Defendant FCA US, LLC ("Defendant") for violation of the Automobile Dealer's Day in Court Act ("ADDCA"), 15 U.S.C. § 1222; breach of the implied covenant of good faith and fair dealing; and violation of California Vehicle Code § 3060. ECF No. 1 ("Compl."). Before the Court is Defendant's motion to dismiss. ECF No. 19 ("Def. Mot."). Having considered the parties' submissions, the relevant law, and the record in this case, the Court hereby GRANTS Defendant's motion to dismiss.

I. BACKGROUND

A. Factual Background

Defendant is the manufacturer and distributor of Chrysler, Dodge, Jeep, and Ram

("CDJR") motor vehicles. Compl. ¶ 2. Plaintiff is a franchised dealer of CJDR vehicles. *Id.* ¶ 7. Plaintiff and Defendant have entered into contracts relating to Plaintiff's sale of CJDR vehicles, and these contracts form the basis of this lawsuit.

1. The Parties' 2006 Dealer Lease and Sales Agreement

On December 6, 2006, Plaintiff entered into a two-year lease ("2006 Dealer Lease") with Defendant[1] for Plaintiff to occupy Plaintiff's current franchise location at 4100 Stevens Creek Boulevard in San Jose, California ("4100 Stevens Creek"). *Id.* ¶¶ 6, 11, 15. Under the terms of the 2006 Dealer Lease, Plaintiff paid Defendant $69,000 in rent per month to occupy the 4100 Stevens Creek location. *Id.* ¶ 21.

Paragraph 25 of the 2006 Dealer Lease provided that "[i]n the event that the Tenant shall remain on the Premises after the expiration or sooner termination of the term of this Lease without having executed a new written lease with Landlord, such holding over shall not constitute a renewal or extension of this Lease." ECF No. 19-1, at 15.[2] Further, paragraph 25 provided that Defendant could "elect, at its option, to treat such holding over as a tenancy upon the same terms and conditions herein stated, except that such tenancy shall be on a month-to-month basis only and the monthly rent due during such tenancy . . . shall be in an amount equal to 200% of the rental set forth" in the 2006 Dealer Lease. *Id.*

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[1] Plaintiff entered the 2006 Dealer Lease with Chrysler Realty Company LLC. Compl. ¶ 9. However, Chrysler Realty Company LLC's interest in 4100 Stevens Creek was acquired by FCA Realty LLC after Chrysler Realty Company LLC went bankrupt. *Id.* ¶ 15. FCA Realty LLC is an "alter ego" of Defendant. *Id.* ¶ 12. For simplicity, the Court will collectively refer to these related entities as "Defendant" for the purposes of resolving this motion.

[2] Plaintiff's Complaint quotes provisions of the Sales Agreement and 2006 Dealer Lease, but Plaintiff did not attach the Sales Agreement or 2006 Dealer Lease to its Complaint. Defendant attached these documents to its motion to dismiss. *See* ECF No. 19-1. "A court may consider evidence on which the complaint 'necessarily relies' if (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Here, the Court may consider the Dealer Lease and the Sales Agreement because Plaintiff "refers to the document[s]" in its Complaint, the documents form the basis of Plaintiff's claim, and "no party questions the authenticity of the cop[ies] attached to the 12(b)(6) motion." *Id.* Indeed, in its brief in opposition to Defendant's motion to dismiss, Plaintiff cites from the documents attached to Defendant's complaint. ECF No. 31, at 9. Accordingly, the Court will treat the Sales Agreement and Dealer Lease as "part of the complaint." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

The Terms Sales and Service Agreement attached to the 2006 Dealer Lease required Plaintiff to "submit directly to the [developer] two sets of complete plans and renderings for the renovation of [Plaintiff's] facility" at 4100 Stevens Creek "[w]ithin two months." ECF No. 19-1, at 25. Plaintiff was also required to "[c]omplete, or cause completion of the renovation and expansion . . . in accordance with the plans and renderings approved." *Id.* at 26.

The parties' also executed a Sales and Service Agreement Additional Terms and Provisions ("Sales Agreement"). *See id.* at 47. Section 11(d)(i) of the Sales Agreement provides that Plaintiff is required to conduct its CJDR dealership operations only at the 4100 Stevens Creek location. *Id.* at 51; Compl. ¶ 8. Further, § 11(d)(ii) of the Sales Agreement provides the following:

> DEALER shall not make any change in the location of Dealership Operations or make any change in the area and use of Dealership Facilities without the prior written approval of [Defendant]. Any written approval of a change in the location or in the area or use of Dealership Facilities shall be valid only if in the form of a new Dealership Facilities and Location Addendum or a separate written agreement signed by DEALER and one of the authorized representatives of [Defendant] identified in Paragraph 10 hereinabove.

ECF No. 19-1, at 51.

2. Defendant's New Lease Proposal

In December 2015, Defendant sent a letter to Plaintiff that stated that, since the parties' two-year 2006 Dealer Lease expired in 2008, Plaintiff had been a "holdover tenant" at the 4100 Stevens Creek Location since the expiration of the 2006 Dealer Lease. Compl. Ex. A.

Defendant enclosed with its letter a proposed new lease ("New Dealer Lease") for Plaintiff's review. *Id.* The New Dealer Lease proposed a five-year lease term with Defendant. *Id.* Defendant's letter stated that if Plaintiff chose not to agree to the New Dealer Lease, "FCA Realty will have no choice but to exercise its right under the Expired [2006 Dealer] Lease, including, without limitation, increasing the current rental rate by 200% as permitted under paragraph 25 thereof, as of January 1, 2016." *Id.*

Defendant's proposed New Dealer Lease provided that Plaintiff would pay Defendant an "initial monthly base rent" of $93,907. *Id.* ¶ 23. The New Dealer Lease further provided Defendant "the right, but not the obligation, to construct new dealership facilities at Plaintiff's Current Location at a cost not to exceed $14,000,000." *Id.* If Defendant chose to exercise its right to construct new facilities, the New Dealer Lease provided a formula for how the parties would calculate Plaintiff's post-construction monthly rent. *Id.*

Plaintiff did not accept the New Dealer Lease. *Id.* ¶ 24. According to Plaintiff, it declined to accept the New Dealer Lease's terms because, among other reasons, "[i]f Defendant's Facility Proposal were implemented, the likely cost would be at or near the maximum cost of $14,000,000, and would result in an annual rent factor expense for the dealership in excess of $2,750,000," which would "exceed a market-based rent for an automobile dealership business at Plaintiff's Current Facility" and would "render Plaintiff uncompetitive and unprofitable." *Id.* ¶ 24.

As of January 1, 2016, in accordance with Paragraph 25 of the 2006 Dealer Lease and the December 2015 letter, Defendant increased Plaintiff's rent by two-hundred percent. *Id.* ¶ 25.

3. Plaintiff's Relocation Request

On January 27, 2016, Plaintiff sent a letter to Defendant requesting approval from Defendant for Plaintiff to relocate and enter into a new facility plan (the "relocation proposal"). *Id.* ¶ 27; Compl. Ex. B. Specifically, Plaintiff's relocation proposal sought approval for Plaintiff to relocate from 4100 Stevens Creek to 3566 Stevens Creek Boulevard ("3566 Stevens Creek"), a location less than a mile away. Compl. ¶¶ 27–28; Compl. Ex. B. According to Plaintiff, by relocating, Plaintiff would pay "an annual rent factor that is at least $2,200,000 less." Compl. ¶ 30.

On February 5, 2016, Defendant rejected Plaintiff's relocation proposal. *Id.* ¶ 31. Defendant stated that Plaintiff "failed to provide any details about the proposed relocation," such

United States District Court
Northern District of California

as "the size or area of the lot," "any construction plans or details," and "any schedule for any proposed relocation or construction." Compl. Ex. C. Defendant also noted that the proposed location at 3566 Stevens Creek was "inferior" because it was "not as ideally situated on the auto row," had "less frontage," and less visibility than the 4100 Stevens Creek location. *Id.* Further, because Plaintiff never renovated 4100 Stevens Creek in accordance with the terms of the 2006 Dealer Lease, Plaintiff had previously failed "to live up to its facility construction requirements" with Defendant, and thus Defendant doubted that Plaintiff would complete the relocation proposal's construction plans. *Id.*

On February 23, 2016, Plaintiff responded to Defendant's rejection "with a detailed letter by its counsel and documentation" that provided further details about the location at 3566 Stevens Creek. *Id.* ¶ 32. For example, Plaintiff explained in its letter to Defendant that the 3566 Stevens Creek location was "5.25 acres" in size and that it was "in a slightly better condition than [Plaintiff's] current location." Compl. Ex. D. Plaintiff also stated that the 3566 Stevens Creek location was "in closer proximity in relation to our main competitors," that it had over 100 more feet of frontage than the 4100 Stevens Creek location, and that "the proposed location feature[d] over 155,000 square feet of display space." *Id.*

On March 29, 2016, Defendant again rejected Plaintiff's relocation proposal. *Id.* ¶ 34. Defendant noted, "[a]s an initial matter . . . [Defendant] reject[ed] the proposal due to its doubt that [Plaintiff] will actually build the promised facility," given that Plaintiff had failed to renovate 4100 Stevens Creek as required by the 2006 Dealer Lease. Compl. Ex. E. Further, Defendant noted that Plaintiff's proposed architectural renderings for 3566 Stevens Creek did not "make sense with respect to the Proposed Location." *Id.* Defendant also retained "two consulting experts" who each "concluded that the Proposed Location is inferior" to the 4100 Stevens Creek location. *Id.* Defendant attached to its rejection letter the two experts' reports. *Id.*

B. Procedural History

On July 24, 2016, Plaintiff brought suit against Defendant in this Court. *See* Compl. Plaintiff alleges three causes of action against Defendant.

Count One states that Defendant violated the ADDCA "[b]y refusing to approve Plaintiff's [relocation proposal] for alleged reasons that are without merit and pre-textual in order to coerce Plaintiff to accept Defendant's Facility Proposal and incur a rent factor that will eventually force Plaintiff to give up the Franchise." *Id.* ¶ 54.

Count Two alleges that Defendant breached the implied covenant of good faith and fair dealing by "refusing to approve Plaintiff's Relocation and Facility Proposal for alleged reasons that are without merit and pre-textual." *Id.* ¶ 62.

Count Three states that Defendant violated § 3060 of the California Vehicle Code by constructively terminating Plaintiff's franchise without providing Plaintiff notice and without a finding of good cause. *Id.* ¶ 69.

On August 23, 2016, Defendants filed a motion to dismiss, contending that all three of Plaintiff's causes of action fail to state a claim for relief. Def. Mot. at 1. Plaintiff responded on September 16, 2016. ECF No. 31 ("Pl. Opp."). Defendant replied on September 30, 2016. ECF No. 36 ("Def. Reply").

II. LEGAL STANDARD

A. Motion to Dismiss Under Rule 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (internal citation omitted).

For purposes of ruling on a Rule 12(b)(6) motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, a court need not accept as true allegations contradicted by judicially noticeable facts, *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and a "court may look beyond the plaintiff's complaint to matters of public record" without converting the Rule 12(b)(6) motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1061, 1064 (9th Cir. 2011). Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179 1183 (9th Cir. 2004).

B. Leave to Amend

If the court concludes that a motion to dismiss should be granted, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted). Nonetheless, a district court may deny leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (alteration in original).

III. DISCUSSION

A. Failure to State a Claim Under the ADDCA

Plaintiff alleges in Count One that Defendant violated the ADDCA, 15 U.S.C. §1221 *et seq.*, by "reject[ing] [Plaintiff's] relocation proposal and . . . insist[ing] that [Plaintiff] remain at its current location, which is economically unsustainable, to coerce [Plaintiff] to abandon its franchises and exit the business." Pl. Opp. at 7; *see* Compl. ¶¶ 34, 46–56. For the reasons discussed below, the Court agrees with Defendant that Count One fails to state a claim under the ADDCA.

In order to state a claim under the ADDCA, a Plaintiff must allege (1) the plaintiff is an "automobile dealer"; (2) the defendant is an "'automobile manufacturer' engaged in commerce"; (3) the existence of "a manufacturer-dealer relationship created by written franchise agreement"; and (4) that plaintiff was "injured by the defendant's failure 'to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer.'" *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 441 (9th Cir. 1979) (quoting 15 U.S.C. § 1222). The parties do not dispute the first three prongs, and thus the only issue is whether Plaintiff has adequately alleged that Defendant failed to "act in good faith." *Id.*

Here, Plaintiff alleges that Defendant acted in bad faith by failing to approve Plaintiff's request to relocate. Compl. ¶ 54. According to Plaintiff, Defendant's rejection of Plaintiff's proposal is an attempt to "force Plaintiff to remain at Plaintiff's Current Location at an unaffordable rent factor." *Id.* ¶ 34, 54; Pl. Opp. at 7. However, even taking the factual allegations in Plaintiff's complaint as true, Plaintiff has failed to allege that Defendant has acted in "bad faith" within the meaning of the ADDCA.

Under the ADDCA, "good faith . . . has a limited and restricted meaning. It is not to be construed liberally." *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir. 1978). Rather, "[t]he courts have held consistently that the Act creates a cause of action an indispensable element of which is not the lack of good faith in the ordinary sense but a lack of good faith in which coercion, intimidation, or threats thereof, are at least implicit." *Marquis v. Chrysler Corp.*, 577 F.2d 624, 633 (9th Cir. 1978); *see also Sherman*, 601 F.2d at 445 ("A showing of coercion and intimidation which produces unfair or inequitable results is essential to a valid claim of lack of good faith under the Dealer's Act."). More specifically, the Ninth Circuit has held that "[c]oercion or intimidation must include a wrongful demand which will result in sanctions if not complied with." *Autohaus*, 567 F.2d at 911.

The facts alleged in Plaintiff's complaint fail to show that Defendant engaged in "coercion" here within the meaning of the ADDCA. Instead, the crux of Plaintiff's complaint is that Defendant has made a "demand" to Plaintiff in the form of denying Plaintiff's proposed relocation. Compl. ¶ 55. This denial, Plaintiff argues, requires Plaintiff to remain at 4100 Stevens Creek where Plaintiff faces an "unaffordable rent factor." *Id.* ¶ 54; Pl. Op. at 8.

Importantly, however, Plaintiff has no right to "the location of its own choosing," even if its current location is unaffordable. *Golden Gate Acceptance Corp. v. Gen. Motors Corp.*, 597 F.2d 676, 680–81 (9th Cir. 1979). In *Golden Gate*, the Ninth Circuit considered a dealer's claim that a manufacturer terminated its franchise in "bad faith" because GM "insist[ed] upon a specific location" for the franchise, even though GM knew that the dealer "was losing money due to the difficulty of operating the franchise at the Premises." *Id.* at 680. GM terminated the dealership after the dealership moved to a new location without GM's permission. *Id.* The Ninth Circuit held that GM had not acted in bad faith under the ADDCA because "[t]here is nothing in the [ADDCA] which gives a dealer the right to dictate the location of its own choosing." *Id.* at 680–81 (internal quotation marks omitted). Accordingly, the Ninth Circuit concluded that "GM did not act in bad faith" in "requiring that the Dealership be located at a specified" location, and thus the Ninth Circuit rejected the dealer's claim. *Id.*; *see also* W. Michael Garner, 2 Franchise &

Distribut. Law & Practice § 14:13 ("It is well-settled that a dealer does not have a right to a particular location and that a manufacturer's termination for failure to relocate is not coercive.").

Plaintiff asserts that *Golden Gate* is distinguishable because, unlike the dealer in *Golden Gate*, Plaintiff is alleging that Defendant's denial of its relocation request was pretext for forcing Plaintiff to remain at 4100 Stevens Creek and eventually "cease doing business as a CJDR dealer." Pl. Opp. at 7–8; Compl. ¶ 34. However, even assuming that this is true, the facts in Plaintiff's complaint nonetheless fail to allege that Defendant engaged in conduct that "amounted to coercion and that as the result of intimidation or threats, [Plaintiff] was forced to act or refrain from acting," as required to establish a violation of the ADDCA. *Wallace Motor Sales, Inc. v. Am. Motors Sales Corp.*, 780 F.2d 1049, 1056 (1st Cir. 1985) (summarizing across-circuit case law regarding the duty of "good faith" under the ADDCA); *see also Autohaus*, 567 F.2d at 911 (listing exemplary "coercive" demands, such as a manufacturer's threat to stop shipping cars unless a dealer resigned its franchise in a neighboring town). To the contrary, the facts alleged in Plaintiff's complaint show only that Defendant made a "demand" in the form of denying Plaintiff's relocation proposal—a proposal that Plaintiff had no right to have approved. *Golden Gate*, 597 F.2d at 681; Compl. ¶ 55. As a consequence of Defendant's rejection of Plaintiff's relocation proposal, Plaintiff simply must remain at 4100 Stevens Creek and pay rent, as required by the 2006 Dealer Lease. Compl. ¶¶ 54–55. Plaintiff has not established coercion within the meaning of the ADDCA. *Wallace*, 780 F.2d at 1056; *see also Fray Chevrolet Sales v. Gen. Motors Corp.*, 536 F.2d 683, 685–86 (6th Cir. 1976) (rejecting a bad faith claim because "there was no 'either-or' attempt at coercion or intimidation").

Indeed, courts have rejected ADDCA claims based on nearly identical factual allegations as those alleged here. In *General Motors Corp. v. Dealmaker, LLC*, a dealer alleged that a manufacturer, GM, had "'coerced' [the dealer] by rejecting [the dealer's] relocation request, and that GM's denial of its relocation request will serve to terminate, either directly, indirectly or constructively, [the dealer's] franchise." 2007 WL 2454208, at *5 (N.D.N.Y. Aug. 23, 2007). The dealer further alleged that "GM ha[d] coerced and damaged [the dealer] by refusing, without sufficient reason, to permit [the dealer's] relocation." *Id.* The district court in *Dealmaker* dismissed the dealer's ADDCA claim under Rule 12(b)(6), stating that the dealer's complaint evinced no "demand, let alone a wrongful demand, by GM." *Id.* Indeed, the district court noted that "[e]ven assuming GM wanted to terminate [the dealership], there is no allegation supporting a plausible claim of coercion or intimidation" regarding GM's rejection of the dealer's relocation request, as required by the ADDCA. *Id.*; *see also Kaiser v. Gen. Motors Corp.*, 396 F. Supp. 33, 42 (E.D. Pa. 1975), *aff'd* 530 F.2d 964 (3d Cir. 1976) (finding that a defendant's repeated refusal of a dealer's requests to relocate did not constitute a violation of the ADDCA because the facts "failed to allege that defendant's conduct even begins to approximate coercion or intimidation").

In sum, Plaintiff has no right "to the location of its own choosing," *Golden Gate*, 597 F.2d at 681, and Defendant's "denial of [Plaintiff's] relocation request" does not amount to coercion or intimidation within the meaning of the ADDCA. *Dealmaker*, 2007 WL 2454208, at *5. Accordingly, because Plaintiff has failed to allege that Defendant acted in bad faith within the meaning of the ADDCA, Count One fails to state a claim for relief under the statute. *Id.*; *see Autohaus*, 567 F.2d at 911 ("[U]nless the transactions between the parties involves coercion or intimidation, or threats of coercion or intimidation," the manufacturer has not violated the ADDCA); *Wallace*, 780 F.2d at 1056 ("To show that [the manufacturer] failed to act in 'good faith' [the dealer] had to prove that [the manufacturer's] conduct amounted to coercion and that as the result of intimidation or threats, [the dealer] was forced to act or refrain from acting and that it suffered damage.").

The Court accordingly holds that Plaintiff has failed to adequately allege a claim under the

ADDCA. However, because it is not evident that amendment is futile, the Court will grant leave to amend for Plaintiff to address the above deficiencies. *See Lopez*, 203 F.3d at 1130 ("A district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts."). Accordingly, the Court GRANTS with leave to amend Defendant's motion to dismiss Count One.

B. Failure to State a Claim Under Michigan Law for Breach of the Implied Covenant of Good Faith and Fair Dealing

Count Two of Plaintiff's complaint alleges that Defendant violated the implied covenant of good faith and fair dealing in refusing to approve Plaintiff's relocation proposal. Compl. ¶¶ 57–64. The Sales Agreements between Plaintiff and Defendant provide that its terms "shall be construed in accordance with the laws of the State of Michigan," and accordingly this claim is governed by Michigan contract law. *Id.* ¶ 58. For the reasons discussed below, the Court agrees with Defendant that Count Two fails to state a claim under Michigan law for breach of the implied covenant of good faith and fair dealing.

In general, "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing." *Belle Isle Grill Corp. v. City of Detroit*, 666 N.W.2d 271, 279 (Mich. Ct. App. 2003); *see also Mathew Enter., Inc. v. Chrysler Grp., LLC*, 2014 WL 3418545, at *10 (N.D. Cal. July 11, 2014) (stating, in a separate dispute between Plaintiff and Chrysler Group, that "Michigan law does not recognize a general implied duty of good faith and fair dealing"). However, Michigan courts have recognized such a duty when "a party to a contract makes the manner of its performance a matter of its own discretion." *Burkhardt v. City Nat'l Bank of Detroit*, 226 N.W. 2d 678, 680 (Mich. Ct. App. 1975)); *see also Stephenson v. Allstate Ins. Co.*, 328 F.3d 822, 826 (6th Cir. 2003) ("An implied covenant of good faith and fair dealing in the performance of contracts is recognized by Michigan law only where one party to the contract makes its performance a matter of its own discretion.").

"Discretion arises," and thus the implied covenant of good faith and fair dealing is recognized, "when the parties have agreed to defer decision on a particular term of the contract" or "from a lack of clarity or from an omission in the express contract." *Stephenson*, 328 F.3d at 826 (internal quotation marks omitted). By contrast, "Michigan law does not imply the good faith covenant where parties have unmistakably expressed their respective rights." *Hubbard Chevrolet Co. v. Gen. Motors Corp.*, 873 F.2d 873, 877 (5th Cir. 1989) (internal quotation marks omitted) (applying Michigan law); *see Lancia Jeep Hellas S.A. v. Chrysler Grp. Int'l LLC*, 2016 WL 1178303, at *9–10 (Mich. Ct. App. Mar. 24, 2016) (quoting *Hubbard* and *Stephenson* approvingly for this proposition). More specifically, under Michigan law, where the "plain language" of an agreement gives a decision "*exclusively* to [one party to the Agreement], the contract presume[s] no discretion and, thereby, remove[s] any basis upon which to imply a covenant of good faith and fair dealing." *Stephenson*, 328 F.3d at 827.

In its motion to dismiss, Defendant relies on the Fifth Circuit's decision in *Hubbard Chevrolet Company v. General Motors Corporation*, 873 F.2d at 877, to argue that the parties' Sales Agreement here does not imply a covenant of good faith and fair dealing under Michigan law. Def. Mot. at 9. In *Hubbard*, the Fifth Circuit applied Michigan contract law to an agreement between a franchisor and franchisee, and held that the plain language of the parties' agreement precluded the court from implying a covenant of good faith and fair dealing. *Id.* The contract between the parties in *Hubbard* stated that "Dealer will conduct the Dealership Operations only from the location . . . approved for that purpose by General Motors." *Id.* at 877. Further, the contract provided that "a dealer who wants to relocate 'agrees to give General Motors prior written notice'" and that "'[n]o change in Dealership Location . . . will be made without the written approval of General Motors.'" *Id.*

Analyzing this contractual language under Michigan law, the Fifth Circuit in *Hubbard* held

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that this language "le[ft] no room for a court or jury to supply limits" because "[t]he contract d[id] not limit the reasons upon which GM c[ould] base its relocation decisions." *Id.* Thus, the parties in *Hubbard* had "deferred no decisions regarding relocation or the relevant factors." *Id.* at 878. Rather, the contract "gave GM the authority to approve or disapprove relocation for its own reasons, and thus set out the limits of what the contract requires of these parties." *Id.* The Fifth Circuit thus held that the implied covenant of good faith and fair dealing did not apply under Michigan law. *Id.* ("[T]he covenant has no role to play in the relocation dispute between GM and Hubbard."); *see also Stephenson*, 328 F.3d at 827 (relying on *Hubbard* to conclude that the covenant of good faith and fair dealing could not be applied to a contract that gave one company the "exclusive judgment to approve or disapprove" a transfer of interest).

The contract language at issue here is substantially identical to the contract language at issue in *Hubbard.* Section 11(d)(ii) of the Sales Agreement states that:

> DEALER shall not make any change in the location of Dealership Operations or make any change in the area and use of Dealership Facilities without the prior written approval of [Defendant]. Any written approval of a change in the location or in the area or use of Dealership Facilities shall be valid only if in the form of a new Dealership Facilities and Location Addendum or a separate written agreement signed by DEALER and one of the authorized representatives of [Defendant].

ECF No. 19-1, at 51. This language, like the language at issue in *Hubbard*, "g[ives] [Defendant] the authority to approve or disapprove relocation for its own reasons, and thus set[s] out the limits of what the contract requires of these parties." *Hubbard*, 873 F.2d at 878. Under the plain language of § 11(d)(ii), "any decision concerning" relocation of Plaintiff's facility "rested *exclusively* with [Defendant]." *See Stephenson*, 328 F.3d at 827. Accordingly, under the reasoning of *Hubbard* and similar cases applying Michigan law, § 11(d)(ii) of the Sales Agreement "presume[s] no discretion and, thereby, remove[s] any basis upon which to imply a covenant of good faith and fair dealing." *Id*; *see Parlovecchio Bldg., Inc. v. Charter Cnty. of*

Wayne Bldg. Auth., 2014 WL 631264, at *3–4 (Mich. Ct. App. Feb. 13, 2014) (applying *Hubbard* and holding that the covenant of good faith and fair dealing did not apply because the parties' contract gave the defendant "the right to unilaterally decide to bring the contract to an end, based on its own interest").

In sum, because the language of the parties' agreement in § 11(d)(ii) "vests in Defendant the express authority to determine whether to" grant Plaintiff's relocation request, "Plaintiff's implied covenant claims are barred by law." *Mathew Enter., Inc.*, 2014 WL 3418545, at *10; *see also Stephenson*, 328 F.3d at 827. Accordingly, the Court GRANTS Defendant's motion to dismiss Count Two. Further, because Plaintiff's claims are barred as a matter of Michigan law, *Mathew Enter., Inc.*, 2014 WL 3418545, at *10, the Court dismisses this claim with prejudice. *Leadsinger*, 512 F.3d at 532.

C. Failure to State a Claim Under California Vehicle Code § 3060

Lastly, Count Three of Plaintiffs complaint alleges that Defendant violated California Vehicle Code § 3060 by "constructive[ly] terminat[ing]" Plaintiff's franchise without providing "written notice" and without a finding by the California New Motor Vehicle Board ("CNMVB") of "good cause for termination," as required by § 3060. Compl. ¶¶ 65–71. For the reasons discussed below, the Court agrees with Defendant that Plaintiff has failed to state a claim under Count Three.

The CNMVB "was created by the [California] Legislature in 1973 in part to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises." *Yamaha Motor Corp. v. Superior Court*, 185 Cal. App. 3d 1232, 1237 (Cal Ct. App. 1986) (internal quotation marks omitted). The CNMVB is given authority by statute to "'[h]ear and consider . . . a protest presented by a franchisee pursuant to'" specified sections of the California Vehicle Code, including § 3060. *Id.* (quoting Cal Veh. Code § 3050).

Section 3060 of the California Vehicle Code provides that "no franchisor shall terminate or refuse to continue any existing franchise unless . . .": (1) the franchisee and CNMV "have received written notice from the franchisor" sixty days prior to termination "setting forth the specific grounds for termination," and (2) the CNMVB finds, if the franchisee "file[s] a protest with the board within 30 days after receiving the 60-day notice," that there is "good cause for termination." *Id.* § 3060(a).

Defendant asserts that Plaintiff has failed to state a claim for violation of California Vehicle Code § 3060 because a violation of § 3060 "falls within the jurisdiction of the [CNMVB]," and Plaintiff has failed to exhaust its administrative remedies. Def. Mot. at 18. As discussed below, the Court agrees with Defendant.

Protests filed "pursuant to Section 3060" of the California Vehicle Code fall within the CNMVB's jurisdiction. *Yamaha Motor Corp.*, 185 Cal. App. 3d at1241 ("[T]he [CNMVB] is specifically empowered to 'Hear and consider . . . a protest by a franchisee pursuant to Section 3060."). California courts have explained that "[i]t is settled that 'where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" *Mathew Zaheri Corp. v. Mitsubishi Motor Sales of Am., Inc.*, 17 Cal. App. 4th 288, 293 (Cal. Ct. App. 1993) (quoting *Abelleira v. District Court of Appeal, Third Dist.*, 17 Cal. 2d 280, 292 (Cal. 1941)). Accordingly, California courts have held that "[t]he [CNMVB] is the administrative forum authorized to make [good-cause] determinations [under § 3060] and provide administrative remedies," and a party that "fail[s] to exhaust its administrative remedies" with the CNMVB is "precluded from seeking judicial relief." *Yamaha Motor Corp*, 185 Cal. App. 3d at 1241.

Plaintiff's complaint contains no allegations that it exhausted its administrative remedies

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with the CNMB prior to seeking relief in this Court. Rather, Plaintiff asserts in its opposition to Defendant's motion to dismiss that, because Count Three is based on allegations that Defendant is *constructively* terminating Plaintiff's franchise, Plaintiff's termination "will not be preceded by a notice of termination under section 3060, and, therefore, [Plaintiff] will have no ability to invoke the board's jurisdiction by filing a protest of the termination." Pl. Opp. at 11. Accordingly, Plaintiff contends that it did not need to exhaust its administrative remedies. *Id.*

Contrary to Plaintiff's argument, California courts have held that "[l]ack of notice does not prevent the [CNMVB] from exercising its powers to resolve disputes between franchisors and franchisees." *Yamaha Motor Corp.*, 185 Cal. App. 3d at 1239–40. Rather, "[t]he administrative remedy of a [CNMVB] protest remains available to [a franchisee], despite the lack of formal notice, and that remedy must be exhausted before [a franchisee] can resort to judicial action." *Id.* at 1240. Accordingly, because claims pursuant to § 3060 of the California Vehicle Code fall within the CNMVB's jurisdiction, and because Plaintiff has not alleged that it has exhausted its administrative remedies prior to filing suit, Plaintiff has failed to state a claim in Count Three. *See Mathew Zaheri Corp.*, 17 Cal. App. at 293.

The Court thus GRANTS Defendant's motion to dismiss Count Three. However, leave to amend is granted so that Plaintiff can allege facts that demonstrate that Plaintiff appropriately exhausted its administrative remedies. *Lopez*, 203 F.3d at 1127 (holding that leave to amend is granted unless the Court "determines that the pleading could not possibly be cured by the allegation of other facts").[3]

[3] Defendant also argues that Plaintiff failed to state a claim in Count Three because Plaintiff failed to allege sufficient facts in its complaint to demonstrate entitlement to injunctive relief. Def. Mot. at 11–12. However, because the Court dismisses Count Three on the basis of Plaintiff's failure to exhaust, the Court need not reach Defendant's preliminary injunction argument. Nonetheless, Plaintiff is on notice of Defendant's argument and must cure any identified deficiencies or face dismissal with prejudice in a second round motion to dismiss, if any.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss as follows: (1) Counts One and Three are dismissed with leave to amend; (2) Count Two is dismissed with prejudice. Should Plaintiff elect to file an amended complaint curing the deficiencies identified herein, Plaintiff shall do so within (30) days of this Order. Failure to meet the thirty-day deadline to file an amended complaint or failure to cure the deficiencies in this Order will result in dismissal with prejudice of Plaintiff's dismissed claims. Plaintiff may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to Rule 15 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: November 16, 2016

Lucy H. Koh

LUCY H. KOH
United States District Judge